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No. 95-347

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HENRY BORELLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JUDD BURSTEIN, P.C.
Attorneys for Petitioner
99 Park Avenue
New York, New York 10016
(212) 681-0606

On the Petition:
JUDD BURSTEIN, ESQ.

47 pp

Question Presented

Whether 18 U.S.C. § 2314 should be artificially extended to reach the crime of automobile theft, which is expressly covered by another statute, 18 U.S.C. § 2312?

List of Parties

Also involved in the trial giving rise to this petition were Paul Castellano, Anthony Gaggi, Joseph Testa, Peter LaFroscia, Anthony Michael Senter, Ronald Ustica, Richard Mastrangelo, Ronald Turekian and Edward John Rendini.

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No.:_____

In The

Supreme Court Of The United States

October Term, 1995

HENRY BORELLI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Henry Borelli respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, denying his motion, pursuant to 28 U.S.C. § 2255, to vacate his conviction.

Opinion Below

The Court of Appeals' unpublished opinion appears at (PA: 1a). [1]

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals entered judgment on June 2, 1995. This petition follows within 90 days.

Constitutional and Statutory Provisions

Pursuant to this Court's Rule 14.1(f), the provisions involved in this petition appear verbatim at (PA: 6a). They are:

U.S. CONST. AMEND. VI

18 U.S.C. §§ 241, 1961(1), 2311, 2312, 2314

26 U.S.C. § 7206

28 U.S.C. § 1254(1), 2255

SUP. CT. R. 14.1(f).

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[1] Numbers preceded by "A:" refer to pages of the Joint Appendix submitted to the Court of Appeals. Numbers preceded by "PA:" refer to pages of the appendix to this petition.

Jurisdiction in the District Court

The District Court for the Southern District of New York (Duffy, J.) had jurisdiction under 28 U.S.C. § 2255.

Statement of the Case

Henry Borelli petitions this Court to review the Second Circuit's affirmance of an order denying his motion, pursuant to 28 U.S.C. § 2255, to vacate his April 9, 1986 jury conviction and 150 year sentence.

At trial, the government alleged that, over an 11 year period, Borelli and others shipped stolen cars to Kuwait, in violation of 18 U.S.C. § 2314. The jury convicted Borelli of 15 substantive § 2314 violations.

In effect, then, Borelli is serving a life sentence for participating in a stolen car scheme. Remarkably, however, he was not charged or convicted under the statute expressly addressed to that crime. That statute, 18 U.S.C. § 2312, provided far lesser penalties than § 2314.

In this Petition, Borelli shows that Congress never intended the substantive crime of automobile theft to be punishable under the National Stolen Property Act. Consequently, Borelli was charged and convicted under the wrong statute. Unfortunately, Borelli's trial and appellate counsel[2] deprived him of an opportunity to challenge that fundamental defect. This double default abridged Borelli's

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[2] It should be noted that present counsel also represented Borelli on direct appeal.

Sixth Amendment right to effective assistance of counsel, and mandates reversal of his conviction.

In rejecting this claim, the Court of Appeals essentially refused to reach the issue of Congress' intent, relying instead upon § 2314's supposedly "unambiguous" language. (PA: 3a) As we show below, the Second Circuit's view rests upon an erroneous interpretation of this Court's precedent.

Statement of Facts

The original 91-page, 78-count indictment in this case charged various named defendants with participating in a stolen car operation. Count One of the severed indictment[3] alleged that, from June 1, 1972 through February 28, 1983, the defendants, including Borelli, conspired to violate 18 U.S.C. § 2314. The object of this conspiracy was to ship stolen automobiles to Kuwait. Counts Two through Seventeen charged the same individuals, including Borelli, with actually transporting the stolen vehicles. Each of these counts was based upon a separate shipping invoice.

On consent, the Trial Court dismissed the conspiracy count on double jeopardy grounds, based upon Borelli's prior guilty plea, in the District of New Jersey, to participating in the very same conspiracy.[4]

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[3] The original indictment was ultimately divided into a number of separate trials.

[4] In addition, Borelli was convicted of conspiring to violate the constitutional rights of Ronald Falcaro and

(continued...)

Following a five and one-half month trial, the jury convicted Borelli on all 15 substantive § 2314 counts. The Court sentenced him to 150 years in prison, consisting of 15 consecutive 10 year terms.

On appeal, the Second Circuit affirmed Borelli's § 2314 convictions. *United States v. Gaggi, supra.*

Thereafter, in April of 1993, Borelli sought relief under 28 U.S.C. § 2255, claiming that he had been denied effective assistance of counsel by his trial and appellate lawyers' failure to recognize and argue that § 2314 did not apply to his charged conduct. (A: 11) After an 18 month delay, the District Court denied Borelli's motion without opinion. (A: 75) On June 2, 1995, the Court of Appeals summarily affirmed, holding that § 2314's "unambiguous" language "unquestionably" covered automobile theft, thereby precluding recourse to legislative history or Congressional intent. (PA: 3a) This petition follows.

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[4](...continued)
Kahled Fahd Darwish Daoud (18 U.S.C. § 241). The Second Circuit reversed that conviction on direct appeal. *United States v. Gaggi, et al.*, 811 F.2d 47 (2d Cir. 1987).

REASONS FOR GRANTING THE PETITION

BORELLI'S CONVICTION MUST BE VACATED BECAUSE HIS TRIAL AND APPELLATE COUNSEL WERE CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO RECOGNIZE AND ARGUE THAT HE WAS TRIED AND CONVICTED UNDER AN INAPPLICABLE STATUTE.

Despite being charged with transporting stolen automobiles, Borelli was not tried or convicted under 18 U.S.C. § 2312. Aptly named the "National Motor Vehicle Theft Act," that statute deals specifically with the transportation and sale of stolen motor vehicles. Instead, Borelli was tried and convicted under the National Stolen Property Act, 18 U.S.C. § 2314, which (i) deals more generally with the transportation and sale of stolen "goods, wares [or] merchandise," and (ii) imposes harsher penalties than were available under § 2312.[5]

Regrettably, Borelli was deprived of an opportunity to press this claim because his lawyers, first at trial and then on appeal, inexcusably failed to raise it.[6]

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[5] As discussed *infra*, Congress recently enacted the Anti Car Theft Act of 1992 (the "Act") (added Pub.L. 102-519, Title I, § 101 *et seq.*, October 25, 1992, 106 Stat. 3384), which increased to 10 years the maximum penalty for automobile theft under 18 U.S.C. § 2312.

[6] If Borelli prevails on his ineffective assistance claim, he necessarily will have met the "cause" and "prejudice" requirements of *United States v. Frady*, 456 U.S. 152, 168, 102 S.Ct. 1584, 1594 (1982); *see Coleman v. Thompson*,

(continued...)

To prevail on an ineffective assistance of counsel claim, a defendant must show, *first*, that counsel's performance was deficient, falling below an "objective standard of reasonable[ ]" competence. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064 (1984). *Second*, a defendant must show prejudice flowing from counsel's action or omission. *Id.* at 694, 104 S.Ct. at 2068. Specifically, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* The *Strickland* test also governs claims of inadequate appellate representation. *Claudio v. Scully*, 982 F.2d 798 (2d Cir. 1992); *Abdurrahman v. Henderson*, 897 F.2d 71, 74 (2d Cir. 1990).

As we now demonstrate, both prongs of the *Strickland* test are met as to Borelli's claims of ineffective assistance of trial and appellate counsel. For clarity's sake, we begin with the prejudice prong.

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[6](...continued)
___ U.S. ___, 111 S.Ct. 2546, 2567 (1991) (attorney error constituting ineffective assistance is "cause" for a procedural default on appeal); *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986) ("if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State").

A. ASSUMING *ARGUENDO* THAT COUNSEL'S FAILURE TO RAISE THE ISSUE MEETS THE FIRST PRONG OF THE *STRICKLAND* TEST, BORELLI MEETS *STRICKLAND'S* PREJUDICE REQUIREMENT

In this section of the petition, we demonstrate why 18 U.S.C. § 2314 does not criminalize the conduct for which Borelli was convicted. Obviously, if we are correct in this contention, *Strickland's* prejudice prong is necessarily satisfied.

Borelli asks the Court to determine whether Congress intended to authorize the federal jurisdiction exercised in this case. Put simply, we contend that the prosecutor's strategic choice of § 2314 was *not* so authorized. As such, Borelli's conviction must be reversed. In effect, the Second Circuit erroneously refused to reach this claim.

At the outset, we acknowledge that courts have rejected the instant argument. *See, e.g., United States v. Parziale*, 947 F.2d 123 (5th Cir. 1991); *United States v. Whaley*, 788 F.2d 581 (9th Cir. 1986). Contrary to this Court's command, however, none of them analyzed the language, legislative history or purpose of §§ 2312 and 2314. Such analysis is essential where, as here, the defendant challenges a statute's scope. *See Dowling v. United States*, 473 U.S. 207, 105 S.Ct. 3127 (1985); *see also McElroy v. United States*, 455 U.S. 642, 656 n.21, 102 S.Ct. 1332, 1340 n.21 (1982) (noting that appellate decisions addressing the scope of § 2314 were unhelpful because they failed to analyze the statute's language, legislative history or purpose).

In *Dowling*, this Court emphasized the need for close scrutiny of these elements:

> Federal crimes, of course, "are solely creatures of statute." ... Accordingly, when assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a "narrow interpretation" appropriate....

473 U.S. at 213, 105 S.Ct. at 3131 (citations omitted); *United States v. Rooney*, 37 F.3d 847, 851 (2d Cir. 1994).

Consistent with *Dowling* this Court should look, first, to the statutory language itself. *Id.*, 473 U.S. at 214, 105 S.Ct. at 3131. In examining that language, the *Dowling* Court stressed that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [the harsher alternative is chosen], to require that Congress should have spoken in language that is clear and definite." *Dowling, supra*, 473 U.S. at 214, 105 S.Ct. at 3131 (citations omitted) (internal quotations omitted).

As noted, § 2312 makes it illegal to transport a "motor vehicle" in interstate or foreign commerce. In turn, 18 U.S.C. § 2311 defines "motor vehicle" to include "an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle designed for running on land but not on rails." Clearly, then, §

2312 explicitly reaches the objects and conduct at issue in this case.

The same cannot be said of § 2314. "To obtain a conviction under [§ 2314], the government must prove beyond a reasonable doubt ... the defendant transported *property, as defined by the statute*, in interstate commerce...." *United States v. Wallach*, 935 F.2d 445, 466 (2d Cir. 1991) (emphasis supplied). Specifically, § 2314 identifies that property only as "goods, wares [or] merchandise." In contrast to "motor vehicles," the phrase "goods, wares [or] merchandise" is not defined in Title 18. As such, it is not readily apparent that § 2314 reaches the objects and conduct expressly addressed in § 2312.

Rejecting this contention, the Second Circuit saw no need to look beyond § 2314's face:

> The plain and ordinary meanings of the words "goods," "wares," and "merchandise" unquestionably include automobiles and auto parts. Where statutory language is unambiguous, courts are not to look to legislative history for interpretation of the statute. *See Ratzlaf v. United States*, [__U.S.__], 114 S.Ct. 655, 662 & n.18 (1994); *United States v. Koehler*, 973 F.2d 132, 134 (2d Cir. 1992).
>
> *Dowling v. United States*, [*supra*,] ... relied on by Borelli, is not to the contrary. *Dowling* concerned the application of section 2314 to the sale of phonorecords that included unauthorized recordings of copyrighted musical compositions. The Court found both that the statutory terms

> "goods, wares, [or] merchandise" were *not apt descriptions for the property rights of a copyright holder*, and that the statutory terms "stolen, converted or taken by fraud" were *not apt descriptions of copyright infringement*. *See id.* at 217. Only after determining in that the language of the statute was in this way *"ill-fitting"* in relation to the charged conduct did the Court turn to the legislative history for illumination about Congress' intent in enacting the statute. *See id.* at 218. No such resort to the legislative history is necessary here, because the plain language of section 2314 perfectly describes the conduct for which Borelli was convicted.

(PA:3a-4a) (Emphasis supplied)

With the greatest respect to the Second Circuit, its facile analysis misses the mark. If § 2314 is read in a vaccuum, the "plain and ordinary meanings of the words 'goods,' 'wares,' and 'merchandise'" would indeed "include automobiles and auto parts." *Id.* But we deal here with statutory meanings, not "plain and ordinary" ones. And the fact remains that another statute, § 2312, expressly addresses "motor vehicle[s]." Plainly, then, Congress knew how to proscribe auto theft, and spoke clearly when it wanted to do so. Yet, in contrast to § 2312, § 2314 is completely silent as to auto theft. At the very least, one must admit that this discrepancy is puzzling. Remarkably, though, the Court of Appeals' analysis virtually fails to acknowledge it or § 2312.

In view of § 2312, § 2314's use of the phrase "goods, wares, [or] merchandise," as in Dowling, also "ill-fit[s]" and "[in]apt[ly]" describes the crime of auto theft. And in view

of § 2312, we respectfully contend that the Second Circuit's conclusion -- "the plain language of section 2314 perfectly describes the conduct for which Borelli was convicted" (PA: 4a) -- lacks a certain intellectual sincerity. Moreover, that conclusion runs counter to *Dowling*'s mandate to tread carefully "when interpreting a criminal statute that does not *explicitly* reach the conduct in question[; the courts should be] reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings.'" 473 U.S. at 218, 105 S.Ct. at 3133-34 (emphasis supplied) (*quoting Williams v. United States*, 458 U.S. 279, 286, 102 S.Ct. 3088, 3092 (1982)). Contrary to the Court of Appeals' view, *Dowling* also rejected the proposition that Congress adopted an indirect, "blunderbuss solution to a problem treated with precision when considered directly." *Id.*, 473 U.S. at 226, 105 S.Ct. at 3137. That reasoning applies with equal force here.

Thus, given §2314's unhelpful language, *Dowling* next directs the Court to consider whether the statute's legislative history and purpose "evince a plain congressional intention to reach" the interstate transportation of stolen motor vehicles. *Dowling*, *supra*, 473 U.S. at 218, 105 S.Ct. at 3134.

In *Dowling*, the Court undertook a similar inquiry, seeking to determine whether Congress intended § 2314 to reach the interstate shipment of goods infringing copyrights. Recognizing that the National Motor Vehicle Theft Act spawned § 2314, the Court summarized the legislative histories of both that section and § 2312:

> Congress enacted § 2314 as an extension of the National Motor Vehicle Theft Act, ch. 89, 41 Stat. 324, currently

1919, the earlier Act was an attempt to supplement the efforts of the States to combat automobile thefts. Particularly in areas close to state lines, state law enforcement authorities were seriously hampered by car thieves' ability to transport stolen vehicles beyond the jurisdiction in which the theft occurred. Legislating pursuant to its commerce power, *Congress made unlawful the interstate transportation of stolen vehicles, thereby filling in the enforcement gap* by "strik[ing] down State lines which serve as barriers to protect [these interstate criminals] from justice." 58 Cong. Rec. 5476 (1919) (statement of Rep. Newton).

Congress acted to fill an identical enforcement gap when in 1934 it "extend[ed] the provisions of the National Motor Vehicle Theft Act to other stolen property" by means of the National Stolen Property Act. Act of May 22, 1934, 48 Stat. 794. See S.Rep. No. 538, 73d Cong., 2d Sess., 1 (1934); H.R.Rep. No. 1462, 73d Cong., 2d Sess., 1 (1934); H.R.Conf.Rep. No. 1599, 73d Cong., 2d Sess., 1, 3 (1934). Again, Congress acted under its commerce power to assist the States' efforts to foil the "roving criminal," whose movement across state lines stymied local law enforcement officials. 78 Cong.Rec. 2947 (1934) (statement of Attorney General Cummings). As with its progenitor, Congress responded in the National Stolen Property Act to "the need for federal action"

> in an area that normally would have been left to state law.

Dowling, supra, 473 U.S. at 218-220, 105 S.Ct. at 3134-3135 (Emphasis supplied) (footnotes omitted); *see also United States v. LaMacchia*, 871 F.Supp. 535 (D.Mass. 1994).

As the foregoing makes abundantly clear, Congress passed both the National *Motor Vehicle* Theft Act and the subsequent National *Stolen Property* Act to "fill[]" "enforcement gap[s]." Importantly, the latter Act did not need to "fill" any such "gaps" concerning motor vehicles, since Congress previously had filled them by its earlier passage of the National Motor Vehicle Theft Act. By logical extension, then, *Dowling* teaches that the absence of a motor vehicle "gap" prohibits the expansion of § 2314 to conduct already covered by § 2312.

Specifically, *Dowling* held that "the premise of Section 2314 -- the need to fill with federal action an enforcement chasm [--]" did not exist with respect to the problem of copyright infringement:

> No such need for supplemental federal action has ever existed ... with respect to copyright infringement, for the obvious reason that Congress always has had the bestowed authority to legislate directly in this area. Article I, § 8, cl. 8, of the Constitution provides that Congress shall have the power
>
> > "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the

> exclusive Right to their respective Writings and Discoveries."
>
> By virtue of the explicit constitutional grant, Congress has the unquestioned authority to penalize directly the distribution of goods that infringe copyright, whether or not those goods affect interstate commerce. *Given that power, it is implausible to suppose that Congress intended to combat the problem of copyright infringement by the circuitous route hypothesized by the Government.*

Dowling, supra, 473 U.S. at 220-21, 105 S.Ct. at 3135 (emphasis supplied).

Applied here, *Dowling*'s reasoning compels the conclusion that Congress -- having already banned automobile theft under § 2312 -- could not have intended the subsequent § 2314 to combat the same problem.

Indeed, later legislative enactments regarding automobile theft confirm that Congress wanted §§ 2312 and 2314 to reach discrete activities, and to "fill" separate "enforcement gaps."

In 1984, for example, Congress amended the RICO statute (18 U.S.C. § 1961 *et seq.*) to expressly incorporate violations of the National Motor Vehicle Theft Act (§ 2312) as predicate acts. *See* Pub.L. 98-547, § 205. Importantly, at the time of this amendment, violations of § 2314 were *already* among the predicate "racketeering activit[ies]" identified in 18 U.S.C. § 1961(1).

Doubtless, Congress knew that § 2314 violations were already predicate acts under RICO. Doubtless, too, it knew that RICO offers "'*new remedies* to deal with the unlawful activities of those engaged in organized crime,'" and that its provisions "'shall be *liberally construed* to effectuate its remedial purposes.'" *Russello v. United States*, 464 U.S. 16, 27, 104 S.Ct. 296, 302 (1983) (*quoting* Pub.L. 91-452, 84 Stat. 922, 947) (emphasis supplied). In short, unless Congress intended the 1984 amendments to be meaningless, one must conclude that it again utilized § 2312 to fill a perceived "enforcement gap."

Thus, consistent with the legislative histories of §§ 2312 and 2314, Congress' belated incorporation of § 2312 violations as RICO predicates suggests that the transportation of stolen motor vehicles previously did *not* fall within RICO or, by implication, § 2314.

Finally, Congress' most recent pronouncement in this area -- the Anti Car Theft Act of 1992, P.L. 519, 106 Stat. 3384 (1992) -- further establishes that it did not mean for § 2314 to reach the transportation of stolen cars.

As with § 2312, Congress apparently intended the Anti Car Theft Act to fill perceived "enforcement gaps" related to automobile theft. Thus, by acknowledging and addressing those "gaps," Congress implicitly confirmed that § 2314 is inapplicable to automobile theft.

First, Congress noted that "*[t]here [presently] are three federal crimes related to auto theft*," House Report ("H.R.") No. 102-851 (I), at 15 (1992):

> interstate transportation of stolen vehicles (18 U.S.C. § 2312), possession or sale of a stolen vehicle that has moved interstate after

> the theft (18 U.S.C. § 2313), and possession or sale of a vehicle or a part of a vehicle knowing that its ID number has been removed (18 U.S.C. § 2321).

Id. Conspicuously absent from this list is any mention of § 2314.

Second, in providing new remedies for the continuing problem of automobile theft, Congress also amended the existing statutory remedies:

> H.R. 4542, as amended, would focus greater Federal attention on auto thieves and the process by which they commit their crime. With respect to the theft of automobiles, a new Federal crime is defined for armed carjacking, forfeiture remedies are applied to auto thieves, and *the Federal sentences and fines are increased for existing Federal auto theft crimes.*

H.R. No. 102-851 (III), at 2 (1992) (emphasis added). Despite its express intention for the foregoing "forfeiture remedies" to apply to "auto thieves," Congress declined to authorize the enforcement of such remedies under § 2314. *See* Pub.L. 102-519, 106 Stat. 3384, 3385 (1992).[7]

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[7] Instead, Section 104 of the Act authorizes civil and criminal forfeitures for violations of 18 U.S.C. §§ 511 (altering or removing vehicle identification numbers); 553 (importing or exporting stolen vehicles); 2119 (carjacking); 2312 (transporting stolen cars); and 2313 (possessing or selling stolen cars).

Similarly, despite its express intention to boost sentences and fines "for existing Federal auto theft crimes," Congress also declined to authorize such increases under § 2314. Instead, those increases only affected §§ 553, 2312, and 2313.[8] If § 2314 reached the transportation of stolen motor vehicles, enhancing the penalties under § 2312 would have been superfluous. This is so because, as previously discussed, § 2314 *already* allowed the maximum 10 year sentence only recently approved by Congress for acts of automobile theft.

* * *

In sum, § 2314's "premise" -- the need to "fill" an "enforcement chasm" -- simply does not apply to the conduct at issue in this case. Congress had long since filled any such "chasm" with 1919's aptly named National Motor Vehicle Theft Act, 18 U.S.C. § 2312. This being so, Borelli was improperly prosecuted under 18 U.S.C. § 2314, and his conviction cannot stand.[9]

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[8] Section 103 of the Anti Car Theft Act of 1992, 102 P.L. 519, 106 Stat. 3384, 3385 (1992), specifically provides that:

> Each of section 2312 and 2313(a) of title 18, United States Code, are amended by striking "fined not more than $5,000 or imprisoned not more than five years" and inserting "fined under this title or imprisoned not more than 10 years".

[9] In a single paragraph, the Second Circuit stated in *dictum* that it found our Congressional intent argument "unpersua[sive]" because "[s]ection 2314 requires proof of

(continued...)

B. TRIAL AND APPELLATE COUNSELS' PERFORMANCE WAS CONSTITUTIONALLY DEFICIENT

1. Trial Counsel's Performance Was Deficient

"Sometimes a single error [can be] so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard." *Nero v. Blackburn*, 597 F.2d 991, 994 (5th Cir. 1979); *accord Brown v. Lockhart*, 781 F.2d 654, 658 (8th Cir. 1986); *Vela v. Estelle*, 708 F.2d 954, 965 (5th Cir. 1983), *cert. denied*, 464 U.S. 1053, 104 S.Ct. 736 (1984); *United States v. Johnson*, 707 F.2d 317, 320 (8th Cir. 1983). This is one of those cases.

In addressing the first prong of the *Strickland* test, a defendant must

> ... identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Strickland, *supra*, 466 U.S. at 690, 104 S.Ct. at 2066.

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[9](...continued)
an element not included in section 2312: that the stolen goods have a value of at least $5,000." (PA: 4a) Given the amendment of § 2312 to eliminate this disparity, we fail to see how the Court's observation diminishes our argument.

Here, trial counsel's failure to challenge the applicability of the statute under which Borelli was prosecuted can hardly be characterized as deliberate or "strategic." *See Strickland*, 466 U.S. at 690-91, 104 S.Ct. at 2066. Rather, it was an inexcusable oversight.

More specifically, trial counsel knew that Borelli had pled guilty to conspiracy charges based on the very acts at issue here. Yet, counsel failed to apprehend the significance of the fact that the prior indictment and plea sounded under 18 U.S.C. § *2312*. That discrepancy alone should have alerted a competent attorney to the fundamental defect in the New York indictment.

Moreover, the stolen automobile counts in this case were also charged as RICO predicate acts. Yet, as detailed above, Congress had not then incorporated National Motor Vehicle Theft Act violations as RICO predicates. Arguably, charging the stolen car counts under § 2314 -- which, unlike § 2312, was then listed as a RICO predicate -- was a strategic attempt to evade Congress' intent. Again, trial counsel's failure to recognize this issue and challenge § 2314's application to the facts of this case fell "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066.

Further, when Borrelli was indicted and tried, no Second Circuit Court had addressed this issue. At the same time, two Courts of Appeals had failed to undertake the statutory analysis required by *Dowling*. *See United States v. Ogden*, 703 F.2d 629 (1st Cir. 1983); *United States v. Grenagle*, 588 F.2d 87 (4th Cir. 1978). That very authority, and the corresponding absence of Second Circuit authority, should have alerted competent counsel to the existence and merit of Borelli's present argument.

Finally, this Court decided *Dowling*, *supra*, well before Borelli's indictment and trial. Counsel's failure to bring that case to the Trial Court's attention was simply inexcusable.

2. Appellate Counsel's Performance Was Deficient

For the reasons just stated, appellate counsel's failure to raise the § 2314 claim -- as well as the resultant Constitutional inadequacy of trial counsel's performance -- likewise fell "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. Because (a) the Second Circuit reversed Borelli's other convictions and (b) the government achieved the remaining conviction under the wrong statute, there can be no doubt that appellate counsel's deficiencies are the "but for" cause of Borelli's continued imprisonment.

Conclusion

This petition should be granted.

Respectfully submitted,

JUDD BURSTEIN, P.C.
Attorneys for Petitioner
99 Park Avenue
New York, New York 10016
(212) 681-0606

On the Petition
Judd Burstein, Esq.
Kim P. Bonstrom, Esq.
Marc Fernich, Esq.

APPENDIX

Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of June, one thousand nine hundred and ninety-five.

PRESENT:

HON. JON O. NEWMAN,
Chief Judge.
HON. J. EDWARD LUMBARD,
HON. JOSEPH M. McLAUGHLIN,
Circuit Judges.

Docket No.
94-2643

HENRY BORELLI,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

ORDER

Appeal from the United States District Court for the Southern District of New York (Kevin T. Duffy, Judge).

Appendix A
Order of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court be and it hereby is AFFIRMED.

Henry Borelli, a federal prisoner, appeals from the October 20, 1994, order denying his motion to vacate his sentence pursuant to 28 U.S.C. § 2255 (1988). Borelli's imprisonment stems from his 1986 conviction for fifteen counts of interstate and foreign transportation of stolen automobiles and auto parts valued at more than $5,000, in violation of 18 U.S.C. § 2314, and one count of conspiring to deny the civil rights of two persons resulting in death, in violation of 18 U.S.C. § 241. On April 9, 1986, the trial judge sentenced Borelli to consecutive terms of ten years' imprisonment for each of the fifteen counts of conviction under section 2314, and to life imprisonment for the count of conviction under section 241. On direct appeal, Borelli's conviction and sentence for the violations of section 2314 were affirmed; however, his conviction under section 241 was reversed, because the government had not proven beyond a reasonable doubt that the murder victims were United States citizens. *United States v. Gaggi*, 811 F.2d 47 (2d Cir.), *cert. denied*, 483 U.S. 1007 (1987).

On April 23, 1993, Borelli filed this section 2255 motion seeking to vacate his conviction on the grounds that (1) section 2314 does not apply to transportation of stolen automobiles and auto parts, and (2) his trial and

appellate counsel were ineffective for failing to raise that issue. The District Court denied the motion by order entered on October 20, 1994.

On appeal, Borelli confines himself to arguing that he received ineffective assistance of trial and appellate counsel because his counsel did not argue that section 2314 does not apply to transportation of stolen *automobiles and auto parts*. To prevail on a claim of ineffective assistance of trial or appellate counsel, a criminal defendant must show (1) deficient performance by counsel and (2) prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Vegas*, 27 F.3d 773, 777 (2d Cir.), *cert. denied*, 115 S.Ct. 284 (1994); *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) (appellate counsel). For the reasons that follow, we reject Borelli's legal argument with respect to the scope of section 2314; therefore, his ineffective assistance claim necessarily also fails, because failure to raise an incorrect legal argument cannot constitute deficient performance that *prejudices* the defendant. *See Lockhart v. Fretwell*, 113 S.Ct. 838 (1993).

Section 2314 applies to the transportation of "goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud." 18 U.S.C. § 2314. The plain and ordinary meanings of the words "goods," "wares," and "merchandise" unquestionably include automobiles and auto parts. Where statutory language is unambiguous, courts are not to look to legislative history for interpretation of the statute. *See Ratzlaf v. United States*, 114 S.Ct. 655, 662 & n.18 (1994); *United States v. Koehler*, 973 F.2d 132, 134 (2d Cir. 1992).

Dowling v. United States, 473 U.S. 207 (1985), relied on by Borelli, is not to the contrary. *Dowling* concerned the application of section 2314 to the sale of phonorecords that included unauthorized recordings of copyrighted musical compositions. The Court found both that the statutory terms "goods, wares, [or] merchandise" were not apt descriptions for the property rights of a copyright holder, and that the statutory terms "stolen, converted or taken by fraud" were not apt descriptions of copyright infringement. *See id.* at 217. Only after determining that the language of the statute was in this way "ill-fitting" in relation to the charged conduct did the Court turn to the legislative history for illumination about Congress's intent in enacting the statute. *See id.* at 218. No such resort to the legislative history is necessary here, because the plain language of section 2314 perfectly describes the conduct for which Borelli was convicted.

We are also unpersuaded by Borelli's argument that Congress could not have intended section 2314 to apply to the transportation of stolen automobiles and auto parts because another statute, 18 U.S.C. § 2312 (Supp. V 1993), is specifically tailored to trafficking in stolen motor vehicles and, at the time of Borelli's conduct, carried a lower maximum sentence of five-years' imprisonment, *see* 18 U.S.C. § 2312 (1988) (amended 1992). Section 2314 requires proof of an element not included in section 2312: that the stolen goods have a value of at least $5,000. Because section 2312, but not section 2314, makes it a federal crime to traffic in stolen motor vehicles of a lower value, the prior enactment and subsequent amendment of section 2312 provide no evidence that Congress did not intend the harsher penalties of section 2314 to apply to

trafficking in stolen automobiles of a greater value. *See United States v. Parziale*, 947 F.2d 123, 126-27 (5th Cir. 1991), *cert. denied*, 503 U.S. 946 (1992); United States v. Whaley, 788 F.2d 581, 582-83 (9th Cir.), *cert. denied*, 479 U.S. 962 (1986), *United States v. Ogden*, 703 F.2d 629, 639 (1st Cir. 1983).

Because section 2314 applies to the conduct for which Borelli was convicted, his trial and appellate counsel were not ineffective for failing to argue that it did not apply.

Appendix B
Constitutional and Statutory Provisions

AMENDMENT VI -- JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 241 CONSPIRACY AGAINST RIGHTS

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be

fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 1961 DEFINITIONS

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to obstruction of State of local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant),

section 1951 (relating to interference with commerce, robbery or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2258 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of that title), fraud in the sale of securities, or in the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act....

Appendix B
Constitutional and Statutory Provisions

18 U.S.C. § 2311 DEFINITIONS

As used in this chapter:

"Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or for flight in the air;

"Cattle" means one or more bulls, steers, oxen, cows, heifers, or calves, or the carcass or carcasses thereof;

"livestock" means any domestic animals raised for home use, consumption, or profit, such as horses, pigs, llamas, goats, fowl, sheep, buffalo, and cattle, or the carcasses thereof;

"Money" means the legal tender of the United States or of any foreign country, or any counterfeit thereof;.

"Motor vehicle" includes an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle designed for running on land but not on rails;

"Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; valid or blank motor vehicle title; certificate of interest in property, tangible or intangible; instrument or

document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing;

"Tax stamp" includes any tax stamp, tax token, tax meter imprint, or any other form of evidence of an obligation running to a State, or evidence of the discharge thereof;

"Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

18 U.S.C. § 2312 TRANSPORTATION OF STOLEN VEHICLES

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined under this title or imprisoned not more than 10 years, or both.

Appendix B
Constitutional and Statutory Provisions

18 U.S.C. § 2314 TRANSPORTATION OF STOLEN GOODS, SECURITIES, MONEYS, FRAUDULENT STATE TAX STAMPS, OR ARTICLES USED IN COUNTERFEITING

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool,

implement, or thing used or fitting to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof--

Shall be fined under this title or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government. This section also shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of any bank note or bill issued by a bank or corporation of any foreign country which is intended by the laws or usage of such country to circulate as money.

26 U.S.C. §7206 FRAUD AND FALSE STATEMENTS

Any person who-

(1) Declaration under penalties of perjury. -- Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance. -- Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return,

affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries. -- Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud. -- Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements. -- In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully --

> **(A) Concealment of property.** -- Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

Appendix B
Constitutional and Statutory Provisions

> **(B) Withholding, falsifying, and destroying records.** -- Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

28 U.S.C. §1254 COURTS OF APPEALS; CERTIORARI; CERTIFIED QUESTIONS

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 2255 FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief,

by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

SUP. CT. R. 14 CONTENT OF THE PETITION FOR A WRIT OF CERTIORARI

.1. The petition for a writ of certiorari shall contain, in the order here indicated:

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point and their pertinent text must be set forth in the appendix referred to in subparagraph .1(k) of this Rule.